



the Board have jurisdiction to address the issue, however, claimant requests the Board to affirm the Order.

The issues before the Board on this appeal are:

1. Does the Board have the jurisdiction and authority at this juncture of the claim to determine whether claimant satisfies the definition of being temporarily and totally disabled?
2. If so, is claimant temporarily and totally disabled?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds this appeal should be dismissed.

This is an appeal from a preliminary hearing order. Accordingly, the Board's review of preliminary hearing orders and findings is limited. Not every alleged error in law or fact is subject to review at this juncture.

The implicit finding that claimant satisfies the definition of being temporarily and totally disabled as set forth in K.S.A. 44-510c is not one of the issues denoted as a jurisdictional issue in K.S.A. 44-534a and subject to Board review in an appeal of a preliminary hearing order. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses that challenge the compensability of the accident or injury under the Workers Compensation Act.<sup>1</sup>

In addition, the Board has the jurisdiction to review allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2008 Supp. 44-551(i)(2)(A) provides:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

But the judge had the authority to determine claimant's right to receive temporary total disability benefits as K.S.A. 44-534a(a)(2) provides: "Upon a preliminary finding that the injury to the employee is compensable . . . the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation . . . ." And the jurisdiction and authority to enter such order is not affected by whether the issue was decided correctly or incorrectly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>2</sup>

Moreover, medical evidence is not essential in establishing the existence, nature and extent of an injured worker's disability.<sup>3</sup>

In conclusion, the Board does not have the jurisdiction or authority in this instance to review the finding that claimant is temporarily and totally disabled.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the Board affirms the August 27, 2009, Order for Compensation entered by Judge Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

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<sup>2</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>3</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>4</sup> K.S.A. 44-534a.

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Brad E. Avery, Administrative Law Judge